

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 270 OF 2020

(Arising from Civil Case NO. 208 of 2019)

KARAM INDUSTRIES LIMITEDAPPLICANT

VERSUS

BESTFUL H.K TRADING LIMITED RESPONDENT

RULING- EX-PARTE

Date of Order: 16/06/2022.

Ruling date: 24/06/2022.

E. E. Kakolaki, J

The applicant herein is seeking for an order against the respondent for deposit in this Court a total amount of USD 17,904, being security for costs as she may fail to recover her costs from the respondent in the event judgment is entered in her favour in Civil Case No. 208 of 2019, as well as her costs in this application. The application is preferred under Order XXV Rule 1(1) and section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC) and any other enabling provision of the law, supported by affidavit of one Jamhuri Johnson, the applicant's advocate. In her response the respondent strenuously resisted it, the resistance which is manifested in the

counter affidavit duly filed by one John Ntine, the respondent's advocate, to that effect.

Briefly the Respondent in this application, a company incorporated in Hong Kong, is suing the Applicant herein claiming for payment of a total sum of USD 56,102.40 (United States Dollars Fifty Six Thousand One Hundred and Two, Forty cents only), being value of goods (cartons 3111) and transportation costs incurred in the business engagement with the applicant, vide Civil Case No. 208 of 2019, pending before this court. The said claims are vehemently disputed by the applicant, the result of which moved her to file this application pressing for an order for deposit of USD 17,904 by the respondent in this Court as security for costs.

When the matter was called on for hearing on 16/06/2022, the date agreed by both parties, the respondent defaulted appearance without notice as a result hearing proceeded ex-parte against her. The applicant was represented by Mr. Jamhuri Johnson, learned advocate who during his submission craved for leave to adopt the affidavit to form part of the submission, the prayer which was granted.

The law under Order XXV Rule 1(1) and (2) both of the CPC, mandates this Court to exercise its discretionary powers to grant the application upon satisfaction of two conditions by the applicant that, **one**, the respondent company is a foreign company and **second** that, it possess no immovable property or sufficient ones in the country other than the property subject of the suit, to be realized by the applicant (Defendant) for recovery of the costs incurred in the course of defending the suit, in the event the same is decided in his favour. Order XXV Rule 1 and 2 of the CPC provides that:

*1.-(1) Where, at any stage of a suit, it appears to the court that **a sole plaintiff is**, or (when there are more plaintiffs than one) that **all the plaintiffs are residing out of Tanzania**, and **that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within Tanzania other than the property in suit, the court may**, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, **to give security for the payment of all costs incurred and likely to be incurred by any defendant.***

*(2) Whoever leaves Tanzania under such circumstances as **to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay***

costs shall be deemed to be residing out of Tanzania within the meaning of sub-rule (1). (Emphasis supplied)

Guided with above conditions the issue before the Court for determination is whether the applicant has met the conditions to warrant this court grant her prayers. Seeking to convince the Court that the applicant has established the two conditions, Mr. Johnson submitted that, the respondent is a foreign company duly incorporated and running its business from Hong Kong as averred in paragraph 4 of the affidavit and duly exhibited by the annexures to the plaint, hence satisfaction of the first condition. As regard to the second condition, though no any factual materials were deposed in the affidavit, he convincingly argued that, since the respondent is foreign company not authorized to own immovable property in Tanzania, it is obvious that she does not possess any immovable property in Tanzania leave alone insufficient one. Hence proof of the second condition.

To start with the first condition this court is satisfied that, the same has been sufficiently established by the applicant. As regard to the second condition, with due respect to Mr. Johnson, I am not prepared to accept his proposition that, the mere fact that the respondent is a foreign company in itself is sufficient proof that, she owns no immovable or sufficient property to cover

applicant's costs should she be successful, in the main suit. The issue of ownership of immovable property being a factual issue is not automatically assumed by the court as Mr. Johnson would like this court to believe. The same ought to have been deposed in the applicant's affidavit as evidence, the duty which she failed to discharge. Since the object of security for costs is to protect the applicant (opposing litigant) against any cost incurred or likely to be incurred in defending the action, I hold it is mandatory for the two conditions to be established. This settled stance of the law was well adumbrated by this court in the case of **Abdul Aziz Lalani & 2 Others Vs. Sandru Mangalji**, Misc. Commercial Cause No. 08 of 2015 (HC-unreported) the position which I subscribe to, when observed at page 6 that:

*"...for the applicants to succeed in this application for provision of security for costs, **they must prove to the satisfaction of the court that the respondent resides outside Tanzania and that he does not possess in Tanzania sufficient immovable property other than the property in suit.**" (Emphasis supplied)*

The Court went on at page 9 to state that:

In this jurisdiction, courts have not been hesitating to allow an application for security for costs if the

applicant has proved existence of two ingredients of Order XXV Rule 1(1) of the CPC. This was aptly summarized by this court [Massati J. (as he then was)] in JCR Enterprises Limited Vs. Islam Balhabou and 2 Others, Commercial Case No. 77 of 2007 (Unreported) as follows:

“Where a foreign company does not have sufficient immovable property in Tanzania the Court should grant the order for security for costs. The purpose of the law is to protect the opposing litigant against any cost likely to be incurred in defending the action, be it a suit or counter claim.” (Emphasis supplied)

In this matter it behooved the applicant to prove the two above named conditions as sections 110 and 111 of Evidence Act, [Cap. 6 R.E 2019], dictate that he who alleges must prove and the burden of so proving lies on the person who would fail if no evidence at all is given on either side. In this matter, the burden to prove possession of immovable or sufficient property would have shifted to the respondent, had the applicant asserted in her affidavit which fact she failed to allege that, being a foreign company, the respondent possessed no immovable property leave alone sufficient one to cover the costs incurred or likely to be incurred. This Court having a duty of exercising its discretionary powers judiciously cannot act on mere

speculation by the applicant that, the respondent being a foreign company possess insufficient property to cover her costs. Since it is evident now that, the applicant has failed to prove the respondent has no any immovable or sufficient property to cover her costs in the event judgment is entered in her favour, I hold that the application is without merit and the same is hereby dismissed in its entirety.

I order each party bear its own costs.

It is so ordered.

DATED at Dar es Salaam this 24th day of June, 2022.



E. E. KAKOLAKI

JUDGE

24/06/2022.

The Ruling has been delivered at Dar es Salaam today on 24th day of June, 2022 in the presence of Mr. Benson Florence, advocate for the applicant and Ms. Asha Livanga, Court clerk and in the absence of the Respondent.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
24/06/2022.